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Proposed Radical Changes in Federal Tax Machinery

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Congress OF THE United States

begun and held at the City of New York, on
Wednesday the fourth of March, one thousand seven hundred and eighty nine.

THE Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure

RESOLVED by the Senate and House of Representatives of the United States of America, in Congress assembled, That the following Articles, be proposed to the Legislatures of the several States, as amendments to the Constitution of the United States, all of which Articles, shall, in all intents and purposes, be considered as part of the said Constitution: viz.

ARTICLES in addition to, and amendment of the Constitution of the United States of America, proposed by Congress, pursuant to the fifth Article of the original Constitution.

First Part of Original Congressional Joint Resolution Containing Text of First Ten Amendments to the Constitution. From National Archives

Congress Celebrates One Hundred and Fiftieth Anniversary of First Meeting

Administrative Law: A Practical Attitude for Lawyers

JOHN FOSTER DULLES

Review of Recent Supreme Court Decisions—Current Legal Literature—Decisions on Federal Rules

Hitting the High Spots: An Annual Meeting Itinerary That Has Everything

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PROPOSED RADICAL CHANGES IN THE FEDERAL TAX MACHINERY

Consideration of Plan Recently Advanced by Mr. Traynor, a Former Adviser to Treasury Department—Because of Drastic Nature of Proposed Departures from Present System, It Should Be Carefully Studied and Its Effects Considered by Administrators and Lawyers within the Government and by the Bar Generally—Review of Present Procedure—Criticism of Details of Proposal—Conclusions

BY G. AARON YOUNGQUIST

Member Committee on Federal Taxation; Former Assistant U. S. Attorney General in Charge of Tax Matters.

A COMPREHENSIVE study of the administrative and judicial machinery for the determination of federal income, estate and gift tax liabilities and a "critical appraisal of the extent to which that machinery has failed to function as it was intended and the reasons for that failure" has recently been made public* by Professor Roger John Traynor of the University of California School of Jurisprudence. He proposes radical changes in the present machinery, affecting not only the Bureau of Internal Revenue, but also the United States Board of Tax Appeals and the district and appellate courts. Because Professor Traynor has lately served as an adviser to the Treasury Department, the drastic nature of the proposed departures from the present system should provoke a careful study of the plan and a consideration of its effects by administrators and lawyers within the government, and by the Bar generally as well as members of it regularly representing taxpayers. The adoption of a plan like the one advanced by Professor Traynor would have the double effect of upsetting well established practices in the field of tax law and of signaling the application of like changes in the functioning of other administrative departments and the procedure for judicial review.

A brief review of the present procedure before the Bureau, the Board of Tax Appeals and the courts is necessary to an understanding of the proposals for change. That relating to the determination of income taxes will suffice.

The taxpayer makes an annual return, the effect of which is to assess a tax against him in the amount it shows to be due. The return is audited in the revenue office or in the field. If the audit indicates that the net income is understated informal conferences usually are had, and if they do not serve to iron out the difference the Internal Revenue Agent in Charge in the taxpayer's district issues notice proposing a deficiency assessment. The taxpayer may file a protest setting forth, among other things, a specification of the items against which he protests and a statement of the grounds upon which the protest is based. He may have a hearing on his protest at the local revenue office. If agreement is not reached he may have a further hearing before the Bureau at Washington (except as this

procedure has recently been altered by decentralization, later referred to). If that hearing does not settle the controversy, a letter of assessment issues and the taxpayer may then follow either of two courses: he may pay the tax, file a claim for refund and, if it be not allowed, sue for the refund in the District Court or in the Court of Claims; or he may, without paying the tax, petition for a redetermination by the Board of Tax Appeals. Under the first procedure the decision of the District Court is reviewable by the Circuit Court of Appeals, and the decisions of that court and of the Court of Claims are reviewable by the Supreme Court upon writ of certiorari. Under the second procedure, the decision of the Board is reviewable by the Circuit Court of Appeals, and the decision of that court is likewise reviewable by the Supreme Court upon writ of certiorari. Choice of the Board procedure precludes subsequent suit for refund after the payment of the tax.

The principal changes proposed may be grouped under these heads:

(1) *Protest Procedure.* A protest must set forth all relevant facts, evidentiary as well as ultimate, list all relevant books and documents and give their whereabouts, and list the names of all persons having knowledge of the facts. The Commissioner's final notice of deficiency must contain specific findings of fact.

(2) *Board Procedure.* The present Board would be split up into five parts or divisions, each functioning separately in its own geographical district. As a condition precedent to redetermination by the Board, the taxpayer would be required to give a bond to secure the payment of the full amount of the deficiency asserted. The taxpayer apparently would be limited on review to the grounds, facts, documents, etc., set out in his protest. The Commissioner would be limited to the issues and findings set out in his notice of deficiency. The Board would be limited to the issues presented by the Commissioner's findings and the burden would be on the taxpayer to prove the Commissioner's findings and conclusions erroneous.

(3) *Judicial Review.* Review of Board decisions by the Circuit Courts of Appeals and the Court of Appeals for the District of Columbia would be abolished. Decisions of the five Boards would be reviewed exclusively by a Court of Tax Appeals sitting in Washington whose decisions would be reviewable by the Supreme Court only upon writ of certiorari. As an

*Columbia Law Review, Vol. XXXVII, No. 8, pages 1393-1435.

alternative proposal, the Court of Appeals for the District of Columbia or the Court of Claims might act as a Court of Tax Appeals.

(4) *Refunds.* The Boards of Tax Appeals would be given exclusive jurisdiction over claims for refund under procedure similar to that applicable to deficiencies. Suits against collectors in the District Courts and against the United States in the Districts Court and Court of Claims would be abolished.

The limitations of time and space prohibit a detailed analysis of the proposals and the specific differences between them and the present procedure, but the foregoing summaries present the contrast. The most that can be done is to discuss in brief and general fashion the strength and the weaknesses of the present system as compared with those of the one suggested.

1. PROTEST PROCEDURE.

(a) *Generally.* No change would occur in the proceedings prior to the notice of deficiency and the protest. Informal conferences between the Revenue Agent and the taxpayer would occur and would result in the supplying of information and in discussions which in many instances would satisfy the taxpayer that he has understated his income or convince the Agent that the suggested deficiency is non-existent. The contents and service of the deficiency notice would not vary materially from the method now used, except that perhaps the time permitted for filing a protest would be longer by reason of the vastly greater burden and responsibility that the proper preparation of the protest would entail. Specifying grounds for the exceptions as required by the present practice necessarily involves a statement of the ultimate facts upon which the taxpayer relies to maintain his protest and a reference to the controlling provisions of the statute or the regulations. Thus the Bureau is fully apprised of the basis of taxpayer's contentions.

The protest presently required may consist of a brief statement of contentions and facts, or it may assume the proportions of a full-grown brief on the facts and the law. That is a matter of choice with the taxpayer, and properly so if he is to have the privilege of presenting his own protest rather than go to the expense of employing an expert to do it for him. And there are many instances, especially those involving only fact or accounting questions, in which the taxpayer may and does properly and effectively present his own case. The taxpayer is not limited either in his discussions with the Bureau or later in preparing his petition for redetermination by the Board and presenting his evidence to the points or the facts set forth in his protest. Those limitations begin with his petition for redetermination, which in effect takes the place of a pleading in a judicial proceeding. Since the protest procedure is preliminary and informal in character and is intended to afford an opportunity for presenting the facts and negotiating a settlement, it would seem entirely proper that the instrument by which it is initiated should be simple and non-technical. The effectiveness of the present procedure is indicated by the settlement during the fiscal year 1937-1938 of 140,000 in the field and 51,000 in the Income Tax Unit of the deficiencies that had been found due. This compares with 211,000 deficiencies recommended during that year and is equal to more than 90% of the total number.

By contrast the protest suggested would include (a) the grounds of protest, item by item; (b) the relevant facts (presumably *all* the facts), both evidentiary and ultimate; (c) a list of relevant documents,

books, papers, etc., with a description sufficient to identify them and their whereabouts; and (d) the names and addresses of persons having knowledge of the facts stated in the protest, together with a brief statement of their connection with the transactions involved. While the taxpayer would have the right to amend his protest before the Commissioner makes his final determination thereon, he would nevertheless, in the proceeding before the Board, be restricted to the contentions made and the facts stated in the protest, except that for good cause shown the taxpayer may, at the discretion of the Board—but not as a matter of right—present additional facts or new theories. Correspondingly the Commissioner would be limited to his findings and conclusions.

The object of the amplified protest of the taxpayer and the findings of the Commissioner is to require full disclosure and adequate consideration while the matter is still in the administrative stage. The object is a laudable one, but the experience of most practitioners before the Bureau is that the same object is achieved under the present practice. Undoubtedly there are exceptions, but for the most part the taxpayer finds it advantageous and wise to make a complete presentation of his facts and contentions and the Commissioner to give them full consideration. The settlement in the administrative stages of nine-tenths of the deficiencies proposed is persuasive evidence of the effectiveness of the present method.

The new form of protest would in many cases impose a tremendous burden on the taxpayer, especially in its requirement that it set out all the evidentiary facts and all of the source material, both documents and persons. The inclusion in the protest of such matter would often increase its volume enormously, and by way of precaution would require the insertion of much that in the final sifting out would prove irrelevant and useless. It constitutes a startling departure from the known forms of procedure. Not even in the more formal and dignified proceedings of courts is anything required that calls for so thorough a preliminary investigation and so meticulous a statement of facts and theories as does the suggested protest. Without doubt it would often serve as a trap in which the unwary would find themselves caught when they came before the Board, and the Commissioner might well often find his chances of success before the Board nullified by some inadequacy of finding or omission of theory in his determinations. Nor could he, after the case comes before the Board, assert additional deficiencies as he may do under the present statute, thus losing the benefit to the government of some increase in income from that source.

(b) *Decentralization of the Bureau.* One of the main criticisms of the Bureau procedure is that the machinery for administrative review is too elaborate and there is a multiplicity of hearings and conferences in the field and in Washington. There is basis for the criticism, but much of the basis should disappear with the decentralization of the reviewing activities of the bureau that is now going on. Five field divisions of the Technical Staff—New England, New York, Central, Chicago and Pacific—with offices at sixteen points have already been established, and others are under way. Each division is staffed by technical advisers, attorneys and other experts. The audits of returns, the proposal of deficiencies by the Internal Revenue Agent in Charge, and hearings on protests by his office, will proceed as before; but if the controversy has not been adjusted by the time that procedure has been gone

through the taxpayer may have it transferred to the appropriate field division of the Technical Staff for further hearing and consideration. The division's determination of the taxpayer's liability is final. It will not be reconsidered by the Bureau at Washington and it is reviewable only upon a petition to the Board of Tax Appeals. Thus the taxpayer, instead of carrying his controversy through the various divisions and sections in Washington after first having had it considered by the local office, will obtain a final determination by the division of the Technical Staff established in his own region. Experience with decentralization will undoubtedly disclose defects in the system, such, for instance, as conflicts in treatment of like questions by different divisions; but the experiment will be watched with interest by everyone affected both within the government and without, and if the hopes of its proponents are realized it will go a long way toward eliminating the complications and delays attendant upon the present procedure.

It must be remembered that the notice, the protest and the hearing are purely administrative and non-judicial in character and are intended to bring about an agreement between the Commissioner and the taxpayer. In view of that purpose, they should proceed with such degree of informality as will enable the disputants not only to exchange views and facts but also to negotiate settlement by concessions on the part of one or both. To require participants in a decidedly informal administrative proceeding to adhere to highly formal and rather burdensome methods involving definitive and inclusive pleadings, findings and conclusions would seem to defeat the very purpose of the administrative proceeding, whether it be conducted in a central or in a decentralized office.

2. BOARD OF TAX APPEALS PROCEDURE.

(a) *Generally.* When the taxpayer files his petition for redetermination of tax liability by the Board, he is free to set up all of the objections to the proposed assessment of which he is then aware and, reciprocally, the Commissioner may not only assert whatever deficiencies he then has but may also claim additional deficiencies. Neither is restricted by the positions taken or limited by the facts developed in the notice or the protest or the hearings. Under the proposed plan the taxpayer would be limited in his proof before the Board to the grounds, the documents and the facts set out in his protest, and the Commissioner would be limited to the issues and facts contained in his findings and conclusions. With respect to the scope of the Board's review, the suggestion is that it would be limited to the *issues* presented by the findings and that the taxpayer "would be required to prove . . . that the Commissioner's *findings* and conclusions were erroneous." Ordinarily the only burden on the taxpayer is that he show that the *assessment* is erroneous; but if Professor Traynor's words mean what they say the taxpayer must successfully controvert the *facts* upon which the Commissioner's assessment is based and must undertake to do so without being advised of the sources from which they come and without opportunity to cross-examine the persons who may have supplied the information upon which the finding rests.

These limitations would prevent the Commissioner from showing that while a deficiency asserted by him on the basis of one item was erroneous, nevertheless the liability should be imposed because of an understatement of income arising from some other item, and conversely the taxpayer would be prevented from off-

setting the understatement on which the proposed deficiency is based by showing an overstatement of an equal or greater amount in some other item. The plan proposes that if the Board takes a different view of the facts or the law from that taken by the parties to the administrative proceeding, or if in the interval between the findings and the hearing before the Board the courts should place a new construction upon the law, the parties might then be permitted to assert theories and prove facts not contained in the protest or the findings. But this would not be a matter of right. It would be permitted only when the litigant is able to convince the Board that there is good cause for relaxing the rule.

The purpose of the restrictions is to make compulsory an all-inclusive showing by the taxpayer and an expressed consideration of every fact by the Commissioner. Professor Traynor suggests that if this sanction proves ineffectual others must be found. The abstract desirability of that result may be conceded; but if its achievement places too onerous a burden on the taxpayer and by a process of formalization robs the administrative procedure of its present opportunities for man-to-man negotiation and adjustment, then more will be lost than gained.

It is time enough to formalize the proceeding when it reaches the Board, and it is not wise to hamper the preliminary settlement procedure by vesting the Commissioner with quasi-judicial powers, which would happen under the proposed plan.

(b) *Decentralization of the Board.* The Board of Tax Appeals now holds hearings in Washington and on "circuit." The times and places for circuit hearings follow a fixed schedule which is of course subject to change whenever the press of business or the convenience of the taxpayers or the Commissioner require it. The Board is divided into sixteen divisions, each member comprising a division. Save in exceptional cases, the hearing is conducted by a single member who makes his findings and conclusions. Any case may be (by request), and most cases of importance are, reviewed by the entire Board. This system serves the convenience of the taxpayers and produces uniformity of decision.

There are few districts in the country the business in which would call for the continuous presence of three Board members as proposed by the new plan. Some advantages doubtless would accrue from permanence of a board within a particular district, such as conveniencing the taxpayers and training the members in problems peculiar to the region. But the taxpayers are served now with reasonable adequacy, and whenever need arises more members could be assigned or more frequent hearings had in a particular area. Indeed, the present personnel of sixteen members, all of them available for service whenever and wherever needed, supplies a more flexible instrument for the hearing and disposition of cases than would a number of boards limited in personnel and restricted in area. A change along the lines proposed would seem just as likely to retard as to expedite the closing of dockets.

A far more serious problem arises with respect to the uniformity of decisions as among the several boards. It is claimed that decentralization could be accomplished without imperilling uniformity, but this appears to be a mere assertion, unless it is based on the assumption that one board is to be bound by the precedent set by any other. Since the plan contemplates that each board or division shall function as a separate unit,

it must also contemplate that each unit will arrive at its own decisions. If the decision of one board shall constitute a binding precedent upon all the others, the result would be that on important questions of law, whether statutory or constitutional, the taxpayers will have the benefit of the experience and wisdom of only three men, because the twelve comprising the other four divisions are not free to exercise their own judgment or arrive at their own conclusions, but are bound by another's decision. If quasi-judicial functions are to be exercised by boards co-equal in jurisdiction and authority, each must necessarily act according to its own lights and arrive at its own independent conclusions.

It is suggested that the boards be under the supervision of the Court of Tax Appeals; but obviously supervision cannot extend to controlling the operation of intelligent and informed minds upon law and fact questions entrusted to them for determination. In the very nature of things it must be anticipated that five groups of men, especially when they do not have the benefit of mutual discussion and exchange of ideas, will often arrive at different conclusions. The likelihood of conflict is strongly indicated by the numerous dissents appearing in the reports of the present Board. When it is remembered that these occur after joint consideration and opportunity for personal discussion, it seems clear that conflicts among the proposed three-man boards would be frequent occurrences. The resulting conflicts would make the work of the Commissioner harder even than it is now. A decision of the present Board naturally carries with it authority, and the Commissioner abides by that decision unless he feels that the interests of the government are unduly jeopardized by it, in which case he indicates by a "non-acquiescence" his intention to disregard it and follow his own interpretation of the law. Now he has a single tribunal to agree or disagree with, and he will disagree only in cases of importance; but with five separate boards he will be confronted with the necessity when one board disagrees with another to express his non-acquiescence with one or the other in every such instance, whether the question decided is important or not.

Someone might suggest that the decision of a decentralized division of the board be followed by the decentralized bureau within the area of the board's district, even though it conflicts with decisions of the other boards. But that would hardly tend toward uniformity in the administration of tax law. The answer might also be made that the Commissioner is faced with a similar difficulty now by reason of conflicts between the Circuit Courts of Appeals. That is true, and it is one of the serious defects of the present system; but it must be remembered that the possibility of those conflicts lies in the relatively small number of cases that reach the Courts of Appeals, whereas under the separate board system the possibility would be several times multiplied because of the larger number of board decisions. There will be enough headaches in the Bureau over conflicts among its decentralized divisions, and conflicts in decisions of the boards would serve only to aggravate Bureau perplexities.

(c) *The Bond on Appeal.* An unfortunate result of the delay in litigating tax cases before payment is the loss of revenues to the government. All agree that every citizen should discharge his tax liability to the extent of his means and that frivolous appeals and dilatory tactics should not be permitted to diminish

the public revenues. Undoubtedly some loss is due to the delay attendant upon appeals to the board, but the nature of the case makes it impossible to determine what part of the failure of collection in cases determined by the Board is due to the passage of time and what part to other causes. Professor Traynor points out that during the fiscal year 1936-1937 some \$16,000,000 in taxes, penalties and interest was assessed upon the closing of dockets by decisions of the Board or on appeal, and that during the same year the government failed to collect some \$1,750,000 that had been assessed after decision by the Board in income tax cases involving \$10,000 or more. The latter figure is a little more than 11 per cent of the former, but no figures are given, and probably none can be given, showing to what extent uncollectibility resulted from the appeal to the Board. Nor are figures available with respect to failure of collection in cases that are not appealed to the Board. Probably the percentage of loss would be lower, but the comparison would be interesting and might be illuminating.

Whatever the situation may be in this respect, the fact is that the Revenue Act gives the Commissioner all powers necessary to protect the government's interest. He may make a jeopardy assessment whenever in his judgment the facts warrant it, and he may make such assessment at any time during the pendency of the case before the Board and until the decision of the Board has become final or until the taxpayer has filed a petition for review by the Circuit Court of Appeals (Revenue Act 1938, section 273 (e)). From that point on the protection against non-collectibility is continued by the requirement that a taxpayer seeking review of a Board decision must, as a condition to appeal, provide a bond conditioned upon the payment of the deficiency finally determined.

The entire purpose of the Board review is to give the taxpayer the chance of a quasi-judicial consideration without first being obliged to pay the tax. In many cases that purpose would be wholly defeated if taxpayer were required to give bond, for, while he may be fully solvent, the burden of the bonding procedure with the payment of premiums as well as interest upon the deficiency, if it be finally established, and sometimes the giving of indemnifying security to the surety, would be so great as to compel him to pay the tax and take his chance on a refund. The man who is able to give bond is also able to pay the tax without too great an inconvenience. The bond requirement would make redetermination by the Board the rich man's privilege and would in many instances exclude from its benefits the "little fellow," of whom there are many, as indicated by the fact that on June 30, 1938, 57.4 per cent of the dockets pending before the Board or before the courts reviewing its decisions involved deficiencies of less than \$5,000.

Under the federal revenue procedure there is no point at which the government is not fully secured—by the right of jeopardy assessments throughout the period of administrative (including Board) consideration, and by bond on appeal to the court. It should not be forgotten that the Board is, after all, not a court, but an agency in the executive branch of the government charged with making an administrative determination for that branch. It would be wholly inconsistent with administrative precedents to require that a taxpayer give bond as a prerequisite to administrative consideration of his contention. Such is not the general state practice, and taking all things into

account the federal government is better equipped through its numerous agencies throughout the country to protect its revenues than are the states. The suggestion that a bond shall be the price of consideration by the executive department of an honest denial of tax liability comes as something of a shock even to the lawyer who is not unfamiliar with technical requirements on judicial review, and will undoubtedly be a severer shock to the layman taxpayer when he hears about it.

Statistics given by Professor Traynor relative to the disposition of deficiencies pending before the Board prove the injustice of a bond requirement. Of the deficiencies involved in cases closed by the Technical Staff in the fiscal year 1937-1938 65.8 per cent were conceded; in those closed by the Appeals Division 69.1 per cent were conceded and in those decided by the Board 88.4 per cent were disallowed. The corresponding averages for the three fiscal years ended with 1938 were 64.4 per cent, 68.6 per cent and 74.2 per cent. From this it appears that after conferences in the field and in the Income Tax Unit had eliminated unwarranted claims, and after the Technical Staff and the Appeals Division had again winnowed out the chaff, nevertheless the Board found that the taxpayer was right and the Commissioner wrong in 75 per cent of the deficiencies claimed. Undoubtedly the more thorough Bureau consideration that is proposed would reduce that percentage, but even if it were cut in two, which is as much as could be expected, the requirement of a bond would be an unwarranted penalty upon the right to review.

3. JUDICIAL REVIEW.

Under the present method the taxpayer or the Commissioner may file a petition for review of a Board determination by the Court of Appeals of the circuit in which the taxpayer resides or, upon stipulation, by the Court of Appeals of the District of Columbia. The proposal is that review of Board determinations be confined to a single Court of Tax Appeals or, alternatively, the Court of Appeals of the District of Columbia or the Court of Claims (which however is a trial and not an appellate court).

The criticism of the present method rests on sound basis. Like questions are not infrequently given conflicting answers in the different circuits. Not only the Commissioner, as pointed out by Professor Traynor, but the taxpayers as well are troubled by the conflicts that inevitably occur. Pending determination of a conflict between circuits the Commissioner and the Board must choose one or the other; and where a question has been decided by one circuit, or by several with the same result, and the answer is in conflict with the views of the Commissioner or the Board, or both, they must choose whether to accept the Court's view or follow their own. The latter objection is not a serious one, because a Court of Appeals' decision is substantial authority and is so regarded by other courts of equal rank and may well be so regarded by the Commissioner and the Board. Disagreement between the circuits is the exception rather than the rule; and, while the government's following a single decision or a series of agreeing decisions later reversed by the Supreme Court may have caused a loss of revenue meanwhile—and incidentally may have cost taxpayers money if the taxpayer instead of the government was on the short end—the dangers of loss of revenue as the

result of subsequent reversals, while not insubstantial, are not so great as to condemn the system.

It is true that when a court overrules the Commissioner he often seeks decision by other courts for the purpose of creating a conflict, and thereby causes inconvenience and annoyance to himself as well as to the taxpayers. The justification is that he seeks deficiencies on the same ground against numerous other taxpayers residing in several circuits. But, after all, how far should the Commissioner go in an effort to overturn the judgment of a court of authority as high as that of a Court of Appeals?

Where conflict between courts does exist the remedy is simple and speedy, for under the rules of the Supreme Court certiorari is invariably granted to resolve it. Keeping other cases open while the conflict lasts works no great hardship on either the Commissioner or the taxpayer.

The proposal is that all reviews of Board determinations be diverted from the eleven Courts of Appeal and concentrated in a single Court of Tax Appeals in Washington. This would have the advantage of eliminating conflicts among courts; but as has already been pointed out, conflicts among divisions of the Board would take the place of conflicts among the courts, and the end result would be not far from the starting point. Indeed the conflicts might well be much more numerous than they are now. The Board now decides six or seven times as many tax cases as do the Courts of Appeals, and even though the new procedure should cut down the number of petitions to the Board it would still be great enough to give rise to conflicts among divisions of the Board well in excess of the present conflicts among the Courts of Appeals.

The suggestion is made that the judicial structure in tax cases would then resemble "a single judicial district, where the decisions of a number of federal district courts of original jurisdiction are reviewed by one Circuit Court of Appeals." From an administrative standpoint that would seem a desirable system, but from the viewpoint of the taxpayer and his lawyer it smacks of over-concentration and centralization. Subjecting the district courts of a circuit to appellate review by a single court works very well, but it must be remembered that instead of one court with nationwide jurisdiction there are ten circuits, each with its own appellate court. Each circuit is, broadly speaking, an appropriate judicial unit by reason of the at least geographical unity of its population and the indigenous quality of many of the legal questions arising within its borders, such as mineral law, admiralty law, commercial law, and others, and by reason of the restricted area it serves its inhabitants conveniently and expeditiously.

Of course a single court of review would make for uniformity and removal of conflicts. But that is not the paramount purpose of jurisprudence. The paramount purpose is that the ultimate decision be the *right* one. The achievement of that end is far more probable if several groups of intelligent men apply their learning and intellect to a given problem than if only one group applies itself to it. And if the several groups agree, that generally settles the question; if they disagree the doubt is almost inevitably of sufficient gravity to call for a decision by the highest court of the land. That decision, as has been pointed out, invariably follows and resolves any conflict that may arise among the circuits, and when the last word has

been spoken the litigant and all others with like interest accept it without question, whether they agree with it or not.

The assertion may safely be ventured that federal tax litigation is as extensive and important as that of any other single class. That being so the litigants, the government as well as the taxpayer, are entitled to a thorough and comprehensive judicial investigation of its problems by the constitutional courts. That is afforded by the present method of review. A single court, whether it be the Court of Appeals of the District of Columbia, the Court of Claims, or a special Court of Tax Appeals, would naturally consist of a limited number of judges who, regardless of the breadth of their experience, would in the aggregate be less well qualified than the combined ability of the judges of the Circuit Courts of Appeals.

Whichever court were chosen for tax appeals, it would almost necessarily sit only in Washington. While the government would be inconvenienced, taxpayers residing at distant points would be subjected to substantial expense and their counsel to considerable inconvenience. The disposition of appeals would hardly be expedited, for according to the report of the October 1938 Conference of Senior Circuit Judges the Circuit Courts of Appeals are generally up with their work, and the considerable increase in the personnel of those courts within the past three years will tend to speed up even more the disposition of cases.

It is believed by many that further concentration in Washington of governmental affairs is not in the best interests of the country. The governmental environment and the constant and almost exclusive contact with bureaus and agencies of the central government and residents of the capitol city have their ultimate effect upon the trend of thought. Governmental officers and especially those of the judiciary should be exposed to intercourse with the people at large. That is one of the advantages of the Bureau's present program of decentralization, and transformation of judicial review from its present decentralized state to a centralized one looks like a step backward.

Although as pointed out by Professor Traynor only 9.4 per cent of the tax cases in the Circuit Courts of Appeals during a given period involved questions of local law, that number is nevertheless substantial enough to weigh in favor of consideration by courts within the local jurisdiction. The suggestion is made that members of divisions of the Board would undoubtedly be appointed from within the division area and would be competent to decide issues turning on a construction of local law. But that does not answer the objection that the body of appellate jurisdiction in such cases, being limited in number and sitting in Washington, would not be as well qualified in that particular as the judges of the circuits. In addition to questions of local law there are also questions of general law not at all peculiar to tax cases. Placing tax controversies wholly in special tax tribunals may well result in the development of an artificial fiscal law. It is neither advisable nor feasible to place tax law in a compartment apart from the great body of general law and fact issues that are involved in almost every tax controversy and thus promote the development on the part of tribunals of a specialized tax attitude rather than the more realistic view that will flow

from the consideration of cases at large and from contact with the public at large.

4. REFUNDS.

In lieu of petitioning the Board of Tax Appeals for redetermination of an assessment proposed by the Commissioner, or in any case where the taxpayer has made an overpayment on his self-declared assessment, the taxpayer may, after paying the tax, file a claim for refund and, if the Commissioner rejects it, bring an action against the United States in the Court of Claims, or against the Collector (or, with certain limitations, against the United States) in the District Courts, to recover the claimed overpayment.

The annual averages of claims for refund of income taxes for the three fiscal years ended with 1938 were 44,066 claims filed and 42,141 claims closed. During the same period the annual average of actions for refund brought in the District Courts was 362, and in the fiscal year ended June 30, 1937, 139 were terminated by trial. Data on the number brought in the Court of Claims is not available, but that number was substantially less as indicated by the figures given below. The average number of actions for refunds (including estate and gift taxes as well as income taxes) closed in the District Courts in the three fiscal years ended with 1937 was 422, and in the Court of Claims 143. From this it appears that nearly 99 per cent of the refund cases are settled in the Bureau without litigation, and that the number of petitions to the Board on deficiencies is about ten times as great as the number of actions for refunds. So the problems of litigation in refund matters are negligible in comparison with those attendant upon the review of deficiencies.

The Board has no jurisdiction over refunds except that it may find an overpayment with respect to the particular year under review upon the deficiency asserted by the Commissioner. The American Bar Association has recommended that the Board be given jurisdiction concurrently with the courts over refund claims presented to and rejected by the Commissioner. Professor Traynor's proposal is that the District Courts and the Court of Claims be divested of jurisdiction of actions to recover tax overpayments, and that the Board be given exclusive jurisdiction to review all refund claims rejected by the Commissioner after proceedings within the Bureau like those had with respect to deficiencies, with the Board's decision subject to review by a Court of Tax Appeals.

There seems to be no particular reason for vesting the Court of Claims with jurisdiction over actions for refunds except that it deals exclusively with claims against the government. The action in the District Courts against collectors is an ancient remedy, and actions against the United States are permitted by the Tucker Act. The taxpayer may, in any case, sue the Collector or the representatives of his estate and is not restricted to an action against the United States unless he chooses to proceed in the Court of Claims. All actions against the United States are triable by the court without a jury; and it is true, as pointed out by Professor Traynor, that there are few jury trials of actions brought against Collectors or their representatives. But it would seem only fair that the right of trial by jury should be preserved to those who wish to avail themselves of it—the government itself did so in the *Astor* case—and that right would be destroyed

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legislation which covers all details. To avoid rigidities which might be seriously disrupting, there should be some discretion in the working out of detailed rules. Furthermore, there would seem to be little serious objection to administrative tribunals, within their respective fields, exercising the prerogative of "judicial legislation" which has heretofore been exercised primarily by the courts. The intimate and specialized knowledge possessed by administrative tribunals seems peculiarly to fit them to play this role. It may also be that certain judicial or quasi-judicial matters should, in the first instance, be decided by the administrative tribunal, particularly if the applicable principle of solution must be drawn from a knowledge of the field as a whole. On the other hand, there are certain types of prosecutory proceedings where guilt or innocence depends upon the omission or commission of certain acts and the absence or presence of certain intents, where there would seem to be little reason for the commission acting as both the prosecutor and judge. Such cases, however, represent but a small fraction of the activities of administrative bodies, and certainly they are not in themselves sufficient reasons for opposing generally the administrative process.

An evolutionary remolding of certain administrative procedures is certainly desirable. To an extent this can be accomplished by internal changes, such as we have referred to, possible within the scope of existing statutes. To some extent statutory amendments may be required. If so, these matters can be frankly discussed, first, with the commission in question, then with the Congress. Wherever it is felt that excessive and unnecessary power has been conferred, the Congress can be asked frankly to curtail that power. Such procedure is certainly more worthy and more apt to be effective than blanket efforts, by measures of indirection, to cripple the entire administrative process.

Proposed Radical Changes in Federal Tax Machinery

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if exclusive jurisdiction were vested in the Board. The right to go to a constitutional court is an effective safeguard even though it be not often used.

Furthermore it seems clear that an unlawful exaction by a Collector gives rise to a cause of action against him personally. That being so, the due process guaranteed by the 5th Amendment to the federal Constitution would seem to entitle the taxpayer to resort to a constitutional court. The decision of the Supreme Court in *Graham v. Goodcell*, 282 U. S. 409, 430-431, and the earlier cases cited in that opinion, call for that conclusion—and it is reinforced by the sharp reaction of the Chief Justice and Mr. Justice Holmes against the suggestion made by government counsel on the argument of the *Graham* case that the action against the Collector was not a personal one but in reality one against the United States.

CONCLUSION.

Federal tax procedure affects directly more citizens than does any other activity of the national government. The present procedure, while not without its faults, works reasonably well. It places no undue burden upon the government or the taxpayer. It permits the taxpayer to have his case tried or reviewed by

constitutional courts of his locality, and the personnel of the offices of the United States Attorneys and the Department of Justice enable the government to present its side without hardship or excessive expense. The present Board of Tax Appeals is only thirteen years old, a brief period in the life of a nation, and while the present procedure of the Bureau and the Board may give rise to some inconvenience and delay and the present method of review to some inconsistencies, most of these defects can be cured without so radical a remedy as that proposed.

Many of the petitions to the Board are due to the giving of notices of deficiency near the end of the period limiting the time for assessment, with the result that too little time remains for adequate presentation and consideration of a protest. Many others are due to the Commissioner's refusal to accept opinion evidence on values or to consider certain issues with respect to which he has established a rule adverse to the taxpayer's contention. The timely issuance of notices and liberalization of the Commissioner's attitude upon the evidence and issues referred to would go far toward cutting down the number of petitions. The large percentage of settlements made by the Technical Staff and the Appeals Division so indicates.

With respect to the Board there is not, as claimed, any "present slow-moving jam of cases." While in the past the Board's docket has been overloaded, the number of pending cases was reduced from 20,017 in May, 1931, to only 6,306 on March 24, 1939, and the number may be divided among the sixteen members. In the fiscal year 1936-1937 5,043 cases were closed as against 4,055 new petitions filed, and in the following year 5,799 as against 4,912, making the docket practically current. When it is considered that 85 per cent of the income taxes are collected upon the taxpayer's self-assessment in his return, and that of the more than six million returns made annually only 5,000, or less than one-tenth of one per cent, find their way to the Board, complaints of excessive litigation of federal taxes seem unjustified.

If there be overmuch tax litigation, may not the fault lie rather with the frequent changes made in the Revenue Acts by the Congress, and the absence of adequate hearings upon and sufficient consideration of proposed amendments, and the extension of Revenue Acts beyond revenue purposes? Taking all things into account, the wise course to follow might well be to await the completion and development of the decentralization of the Bureau and the passage of time to permit the settling of the form and content of the principal parts of the taxing statutes.

De Profundis

"It is certain that many members, old and young, have ideas based on their particular experiences which would interest our readers. We have from time to time urged the contribution of such ideas, but, unhappily, to very little purpose. We say again, most emphatically, that the Bulletin positively craves contributions—long or short. If this little journal published by the Association could become a journal of discussion with many contributors, it would be of far greater value and interest, to say nothing of the relief it would be to the editor to sit back and never put pen to paper."—*Bar Bulletin* (Boston)